Supreme Court, U.S.
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NO. 94 732 OCT 2 1 1994

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ALABAMA,

PETITIONER - APPELLEE,

V.

WALLACE H. BONNER,

RESPONDENT - APPELLANT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[28 U.S.C. §2254 PROCEEDINGS]

PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTIONS PRESENTED FOR REVIEW

1. On federal habeas corpus review of a state conviction under 28 U.S.C. §2254, does the Petitioner or the Respondent state bear the burden of proving that a constitutional error had or did not have a substantial and injurious effect or influence in determining the jury's verdict under Brecht v. Abrahamson, 507 U.S. ____, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993).

2. In light of this Honorable Court's granting of review in O'Neal v. McAinch, ____ U.S. ____, 114 S. Ct. 1396, 128 L. Ed. 2d 70 (1994), to review the above question 1, (O'Neal v. Morris, 3 Fd. 3rd 143 (6th Cir. 1993) should the court grant the writ to review the same question in this case.?

THE PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
THE PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF CASES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
STATEMENT OF THE FACTS	7
SUMMARY OF THE ARGUMENT	10
ARGUMENT	11
CONCLUSION	23

TABLE OF CASES

PAGE(S)

Brecht v. Abrahamson,
____ U.S. ____, ____, 113
S. Ct. 1710, 1722, 732,
88 L. Ed. 2d 814 (1986)..... 12

Brecht v. Abrahamson,
113 S. Ct. 1710 (1993)..... 12

Chapman v. California,
386 U.S. 18 (1967)..... 15

Engle v. Isaac,
456 U.S. 107 (1982)..... 16

Kotteakos v. United States,
328 U.S. 750, 776,
66 S. Ct. 1239, 1253,
90 L. Ed. 2d 1557 (1946)..... 12

Kotteakos v. United States,
328 U.S. 750 (1946)..... 13

O'Neal v. McAninch,
3 F. 2d 143 (6th Cir. 1993),
cert. granted, ____ U.S. ____,
114 S. Ct. 1396, 128 L. Ed.
2d 70 (1994)..... 11

O'Neal v. Morris,
3 F. 3d 143 (6th Cir. 1993),
cert. granted, ____ U.S. ____,
114 S. Ct. 1396, 128 L. Ed. 2d
70 (1994)..... 11

United States v. Frady,
456 U.S. 152 (1982)..... 16

OPINIONS BELOW

1. The opinion of the Eleventh Circuit Court of Appeals reversing the Southern District of Alabama and remanding the cause for issuance of the writ is not yet reported and is reproduced as Appendix A to this petition.

2. The Order of the United States District Court for the Southern District of Alabama is reproduced as Appendix B to this petition.

3. The Recommendation of the Magistrate Judge is contained as Appendix C to this petition.

JURISDICTION

The Eleventh Circuit Court of Appeals reversed and remanded this cause on July 25, 1994, and this petition is filed within ninety (90) days of said date. The Honorable Court's Jurisdiction is invoked

under 28 U.S.C. §1254(1), as amended (by Public Law 100-352) on June 27, 1988.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the

Assistance of Counsel for his defense.

There is no issue of the constitutionality of a statute before this Court. Relevant statutes are contained in Appendix D and F.

STATEMENT OF THE CASE

The error at issue in this case first arose when Respondent, Wallace Bonner was charged with theft of property in the second degree for shoplifting several cartons of cigarettes from a grocery store. He was tried before a duly struck jury in Mobile County Circuit Court, Mobile, Alabama.

After the presentation of the case, the jury began deliberations. The jury

announced that it had reached a verdict and the foreperson read a verdict of guilt in the open courtroom. The trial judge, immediately following the reading of the verdict, adjudged Bonner guilty and asked the prosecutor, "Is the defendant a habitual offender?" The prosecutor responded in the affirmative and the defense counsel then asked for a poll of the jury. During the poll of the jury it became apparent that a unanimous verdict had not been reached. One of the jurors stated that she did not agree with the verdict of guilt. The court then sent the jury back for further deliberations. Defense counsel moved for a mistrial based upon the fact that Bonner's status as an habitual offender had been revealed to the jury. The judge denied the motion and did not inquire into whether the jury had heard the remark or instruct the jurors to

disregard the comment. The jury later returned a verdict of guilt.

Respondent was sentenced to life imprisonment as an habitual offender. Respondent appealed his conviction and sentence to the Alabama Court of Criminal Appeals and his conviction was affirmed without opinion on December 30, 1988. An application for rehearing was overruled on April 28, 1989. A petition for writ of certiorari was granted on June 20, 1989. On September 29, 1989, the writ of certiorari was quashed as being improvidently granted. No post conviction petitions were filed in state court.

On May 23, 1990, Respondent filed a §2254 petition in the United States District Court for the Southern District of Alabama. (R.1-1-1). Petitioner filed an answer and motion to dismiss and/or motion for summary judgment. (R.1-7-1)

and (R.1-8-1). On May 8, 1992, the United States Magistrate Judge recommended that Respondent's habeas corpus petition be denied on the ground that the error was harmless under Chapman v. California, 386 U.S. 18 (1967) which was thought to be the proper standard. (R.1-23-26).

On June 30, 1992, the district court, after a de novo review, issued an order adopting the Magistrate Judge's report and recommendation. (R.1-28-1). On July 29, 1992, Respondent filed notice of appeal. (R.1-30-1). The district court granted the Respondent a certificate of probable cause. (R.1-33-1).

On July 25, 1994, the Court of Appeals for the Eleventh Circuit correctly ruled that the district court applied the wrong standard but incorrectly reversed and remanded for issuance of the writ of habeas corpus holding that the trial

court's error in revealing Respondent's habitual offender status to the jury prior to deliberations in a guilty verdict resulted in actual prejudice. This issue is now before this Honorable Court.

STATEMENT OF THE FACTS

While a customer at the Food World on the corner of Shelton Beach and Moffat Roads, Deputy Sheriff Calvin Niehart observed a black male pushing a buggy down an aisle. (See T.T. 4-7) Several cartons of cigarettes were in the top portion of the buggy and other items were in the larger portion of the buggy. (See T.T. 4-5) When Niehart went to the next aisle, he noticed that the cigarettes were not in the buggy and that the black male was walking toward the store's entrance at a fast pace. (T.T. 5) Niehart informed the manager that the man had stolen some

cigarettes. (Id.) Niehart and the manager followed the man out of the store and ordered him to stop. (See id.) The man got in a pick-up truck driven by another black male and the two men left the parking lot at a high rate of speed. (Id.) Niehart got in his patrol car and the driver stopped once the deputy overtook them. (T.T. 6) Niehart got the suspect passenger out first, searched him and then placed him in a Mobile Police Department squad car. (Id.)

Following the arrival of a backup car, the pick-up was searched and five cartons of cigarettes were found under the passenger's side of the front seat. (T.T. 7) According to Niehart, the cigarettes found there -- Kools and Salems -- were the same as those he had seen in the buggy at Food World. (Id.)

Both subjects were placed in the Mobile police officers' squad car and transported back to the Food World. (Id.) Niehart identified Bonner as the man he observed taking the cigarettes. (Id.)

Soon after being transported to the Food World, Bonner told the store's manager, Ron L. Sellers, that he took the cigarettes and that his friend had nothing to do with it. (T.T. 11 & 20) Sellers testified that five cartons of cigarettes were returned to the store. (T.T. 20) The manager could not remember the brand of cigarettes returned but stated their approximate value was fifty-five dollars. (Id.) Sellers testified that the cigarettes were marked with the words "Food World Store 17, . . . , 4720 Moffat Road, " thus indicating that they came from this store. (T.T. 21) The store

manager admitted on cross-examination that it was possible that the cigarettes were actually purchased at the Food World at some other time. (T.T. 22)

The defense called no witnesses. The jury returned a verdict finding the defendant "guilty of theft of property in the second degree as charged in the indictment." (T.T. 34)

SUMMARY OF THE ARGUMENT

Historically this Court has held that, except in cases on direct appeal, a party seeking to set aside a conviction on alleged constitutional error has the burden of proving that any errors alleged to have occurred are of significant magnitude to justify reversal. This Honorable Court adopted this same standard in Brecht v. Abrahamson, 507 U.S. ____, 113 S. Ct. 1710, 123 L. Ed. 2d 353

(1993). In the case at bar, the Eleventh Circuit Court of Appeals erroneously placed this burden on the State.

ARGUMENT

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED DUE TO CONFLICT WITH THE DECISIONS OF THE COURTS OF APPEALS.

This Court should grant certiorari to review the decision of the Eleventh Circuit Court of Appeals which held that the burden of proving error harmless in habeas corpus cases remains with the government. There is a split among the federal circuits on this issue and said issue is presently before this Court in the case of O'Neal v. McAninch, 3 F. 2d 143 (6th Cir. 1993), cert. granted, ____ U.S. ____, 114 S. Ct. 1396, 128 L. Ed. 2d 70 (1994). The Petitioner will not engage in a lengthy discussion of this Court's

decisions in Brecht v. Abrahamson, 113 S. Ct. 1710 (1993) because the Ohio Attorney General's Office did an excellant job in its brief outlining the issue before this Court. The State of Alabama merely submits that the instant case is due to be reviewed as the Eleventh Circuit reached an incorrect result.

This is a case in which the Eleventh Circuit has misapplied the harmless error standard announced in Brecht v. Abrahamson, ____ U.S. ____, ____, 113 S. Ct. 1710, 1722, 732, 88 L. Ed. 2d 814 (1986). The Eleventh Circuit states in its opinion that according to this reading of Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239, 1253, 90 L. Ed. 2d 1557 (1946) the State bears the burden of proving a constitutional error harmless. Therefore this cause was reversed based on the manner in which the

Eleventh Circuit interpreted the law. The Eleventh Circuit's holding is clearly erroneous.

The Court has recently held that on federal habeas review of state conviction, the proper standard for determining whether any alleged error should result in reversal of the petitioner's state conviction is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 113 S. Ct. 1710 (1993). The Court thus adopted a standard that had been in existence for decades. See Kotteakos v. United States, 328 U.S. 750 (1946). In explicating that standard, the Court stated in Brecht that the burden of showing that an alleged error "had substantial and injurious effect or influence in determining the jury's verdict" so as to warrant reversal

rests upon the habeas petitioner. This formulation of the proper standard on collateral review has generally been applied without difficulty by the lower courts.

The Court's formulation in Brecht of the standard for determining when alleged errors warrant reversal of a judgment is consistent with the historical background of appellate review in the federal courts. The ordinary formulation places upon the party seeking to reverse a judgment the burden of demonstrating that any errors alleged to have occurred are of sufficient magnitude to justify reversal. This formulation of the standard of review is faithful to the general tenor of decisions both before and after Kotteakos. The sole exception to this general approach has been the direct appeal standard of review adopted from

Chapman v. California, 386 U.S. 18 (1967), which the Court in Brecht explicitly rejected for federal habeas proceedings.

The Brecht standard for determining when alleged errors warrant reversal of a judgment is especially appropriate on federal habeas review of state convictions under 28 U.S.C. §2254.

Habeas corpus actions brought under 28 U.S.C. §2254 are civil actions, as the Court has long recognized. But the established approach to harmless-error review in civil actions, under Kotteakos and similar cases, is that the party seeking to reverse a judgment bears the burden of demonstrating that any errors alleged to have occurred are of sufficient magnitude to justify reversal. This is the approach taken under Federal Civil Rule 61, in particular, which is made applicable to federal habeas actions by

Rule 11 of the Rules Governing Section 2254 Cases, 28 U.S.C. foll. §2254, and thus governs this case.

In addition, as the Court has emphasized in Brecht and many other cases, finality concerns, special considerations of comity, and the social costs of belated retrials are all implicated by collateral habeas review, especially by federal challenges to state convictions. See Engle v. Isaac, 456 U.S. 107 (1982); United States v. Frady, 456 U.S. 152 (1982). These special problems justify the Court's view that a habeas petitioner must clear a significantly higher hurdle than would exist on direct appeal, consistent with the central interest in assuring the reliability of the criminal process. This sensible distinction is faithfully captured in the differences between the Chapman and Brecht standards,

including their respective allocations of the burden of showing that alleged errors have had a sufficient effect on the jury's verdict to justify reversal of a presumptively valid conviction.

At the same time, the specific safeguards noted in Brecht -- including application of the Chapman standard on direct appeal, the requisite careful examination of the whole record on collateral review, and faithful application of the Kotteakos formulation rather than a simplistic assessment of probable guilt -- suffice to protect the traditional role fulfilled by the writ of habeas corpus.

In this case, the error alleged by the Respondent, the alleged disclosure that he was an habitual offender, would not have "substantial and injurious effect

or influence in determining the jury's verdict.

The Eleventh Circuit held that the district court erred in finding that the State demonstrated that Bonner was not prejudiced by the error in this case. The district court did not employ the new standard set out in Brecht. Rather the district court found under Chapman v. California, 386 U.S. 18 (1967), a more strigent standard, Bonner had failed to meet his burden. The Eleventh Circuit held that under the less stringent standard announced in Brecht, the State had failed to meet its burden. The Eleventh Circuit's decision indicates that their reading of Kotteakos v. United States, 328 U.S. 750 (1946) dictated the results they reached. This result is in error. Bonner did not establish that he was prejudiced by the error in this case.

At the federal evidentiary hearing in this case, two randomly selected jurors were called to testify, which happened to include the jury foreman, Vaughn Seville Reed. A third juror, Leona Marshall, who claimed the verdict was not hers was also called to testify. They all indicated that they heard the statement made by the trial court regarding Bonner's "habitual felony offender" status.

Vaughn Reed testified at the evidentiary hearing that she served as foreperson of a June 9, 1988 jury in Mobile County, Alabama in which the Appellant was the defendant. According to Ms. Reed, after deliberations they reached a guilty verdict. After the judge inquired if the defendant was an habitual offender, defense counsel requested to poll the jury. At that time, Leona Marshall stated that it was not her

verdict. Reed testified that Ms. Marshall was confused the second time they deliberated, just as she had been confused the first time they deliberated. Ms. Marshall's confusion came from whether or not the cigarettes that Appellant was accused of stealing came from Food World. Reed testified that Ms. Marshall believed Appellant stole the cigarettes but she wasn't sure that they came from Food World. Reed further testified that the evidence was so clear at trial that no one had any question as to the evidence. Reed also testified that Bonner's prior criminal record was not discussed during the second deliberation period.

Leona Marshall testified that she never felt the Bonner was guilty but she "went along with the crowd" to keep from staying so long. Hence, the district court correctly concluded that Ms.

Marshall's guilty vote was not based on the fact that she had heard the judge say the Bonner was an habitual offender. The State clearly presented enough evidence to support the district court's finding that Bonner was not prejudiced by the error in this case.

In O'Neal v. McAinch, the prosecutor's remark during closing argument is at issue. The Sixth Circuit held that the errors were not of such magnitude that they "had a substantial and injurious effect or influence in determining the jury's verdict. The Sixth Circuit further held that based on all of the other evidence, the alleged errors did not influence the jury's decision. This is the same result the district court reached in the case at bar. The evidence of Bonner's guilt was so overwhelming that the alleged error in asking if he was an

habitual offender had no effect on the verdict.

This case is a clear example of how different courts reach different results. There is no need to convince this Honorable Court that this issue needs to be resolved since this Court issued the writ in O'Neal v. McAninch, (cert. granted), ____ U.S. ____, 114 S. Ct. 1396, 128 L. Ed. 70 (1994). The only difference in this cause and O'Neal is the Sixth Circuit placed the burden on the habeas petitioner and the Eleventh Circuit placed the burden on the State. Clearly certiorari needs to be granted to resolve the split among the federal circuits.

CONCLUSION

This Court should grant the State's petition and proceed to hear the merits of the issue raised.

Respectfully submitted,

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